THE LEGAL STATUS OF HUDSON'S BAY

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Among the early explorers of North America who have left their names clearly fixed upon the map of the world was Henry Hudson. This has happened in a threefold way: for by his name are designated a majestic river, a wide strait and a great sea. An Englishman, he navigated not only under the flag of his own country, but likewise at times he served the States General of the Netherlands.

In 1607, in command of the Dutch ship, the *Half Moon*, Hudson entered the Hudson River. Three years later, with the English vessel, the *Discovery*, he passed through and explored Hudson's Strait. In June, 1610, he entered and discovered the great sea that ever since has been known as Hudson's Bay, which was to be alike his tomb and his chief monument.

Until comparatively recently, Hudson's Bay has been accepted by the international jurisconsults of the world at large as forming, according to the tests of the rules of the law of nations, a part of the high seas. Within the last few years, however, a desire has begun to grow up in Canada to annex to the territorial waters of the Dominion *in toto* that great sea which bears Hudson's name. For example, in the last edition of the "Encyclopaedia Britannica" (1910), it is stated that Canada is anxious to declare Hudson's Bay a *mare clausum* on account of the whale fishery. Let us consider very briefly the legal status of the waters of the Hudsonian Sea.[1]

Hudson entered that sea at a time when the struggle between the principle of *mare liberum* and *mare clausum* was becoming an active factor in the political relations between the English and the Dutch. In earlier times, under the Tudors and other more ancient sovereigns, England had pursued a liberal policy as regards commerce upon and fishery in the sea. Indeed, the greatest of the Tudors,

[1] For a more extended and detailed consideration of this important international question than can be presented within the space of this short article, see an essay by the present writer, "La baie d'Hudson, est elle une mer libre ou une mer fermée?" in the *Revue de Droit International et de Legislation Comparee*, Brussels, 1911, vol. XIII, new series, pages 539–586.

Queen Elizabeth, in a famous answer to the Spanish ambassador at her court, Mendoza, supported the freedom of the seas. After Drake's return in September, 1580, from a voyage around the world, with a mass of plunder that he had captured from Spanish vessels and settlements on the coast of South America, the Ambassador of Philip II made a complaint directly to England's Queen herself. After pointing out in her reply that Drake was amenable to a personal action in the courts of England if he had injured any one, the Queen continued that the Spaniards had no right to justify them in excluding the English from trading with the West Indies. Then, as Camden tells us, Elizabeth went on to say:[2]

"Moreover all are at liberty to navigate that vast ocean, since the use of the sea and the air is common to all. No nation or private person can have a right to the ocean, for neither the course of nature nor public usage permits any occupation of it."

With the advent of the Stuarts to the English throne the liberal policy of England as regards the sea was reversed. She laid claim to more and more exclusive rights over the seas surrounding her and ultimately forced and fought three bloody naval wars with the Dutch for the control of the narrow seas and the right of exclusive fishery in them.

In reply to Grotius's essay, *mare liberum*, printed at Leyden in 1609, King Charles I of England caused Selden's *mare clausum* to be published at London in 1635. While most nations have supported sometimes one side, sometimes the other, of this contention, as accorded best at the given moment with their respective policies, the opinion of the world has inclined finally to the view advanced by Grotius. The famous Hollander in his larger and more mature work, *De jure Belli ac Pacis* (1625), however, recognized that a state has the right to exercise its authority over a strip of sea along its coast line. At the beginning of the eighteenth century, another Dutch jurisconsult, Bynkershoek, expounded more precisely the extent of this sovereignty of nations over the sea washing their shores. As a general maxim, he taught, *imperium terræ finiri ubi finitur armorum potestas*.[3]

Applying this principle to things as they were in his time, Bynker-

[2] Camden: *Annales*, s. a. 1580 (edition of 1605), 309.

[3] Bynkershoek: *Jcti et Praesidis, Quaestionum Juris Publici, libri duo*, Leyden, 1737, liber I, cap. VIII, folio 59.

shoek limited the extent of the exclusive sovereignty of states over the sea to the range of a cannon shot.

In deciding whether the waters of a bay or other sinuosity were territorial or part of the open seas, the test advanced by publicists and international jurisconsults came to be whether the entrance of any embayed body of water could be defended and controlled from the opposite shores.

In 1758, the Swiss, Emer de Vattel, wrote:[4]

"All we have said of the parts of the sea near the coast may be said more particularly, and with much greater reason, of the roads, bays and straits, as still more capable of being occupied and of greater importance to the safety of the country. But I speak of the bays and straits of small extent and not of those great parts of the sea to which these names are sometimes given, as Hudson's Bay and the Straits of Magellan, over which the empire cannot extend, and still less a right of property. A bay whose entrance may be defended may be possessed and rendered subject to the laws of the sovereign, and it is of importance that it should be so, since the country may be much more easily insulted in such a place than on the coast open to the winds and the impetuosity of the waves."

Thus Vattel insists that in order that a bay may be considered to be a *mare clausum*, its entrance from the sea must be so narrow that it can be dominated and controlled from the opposing shores. Hudson's Strait, which connects Hudson's Bay with Baffin's Bay and the Atlantic Ocean, is at all points forty-five miles wide, and in general it extends to a width far greater, generally of about one hundred miles.[5] According to the above formulated test of Vattel, Hudson's Bay is an open sea. And in addition, Vattel specifically names Hudson's Bay as an open sea.

With the passage of time before and after Vattel had given the above cited opinion that Hudson's Bay was an open sea, the extent of the territorial sea was gradually fixed at the distance of a cannon shot from the land, which was translated by degrees into one marine league or three miles.

The three-mile limit was consecrated by the United States and Great Britain in the first article of the treaty of 1818. It was sub-

[4] Emer de Vattel: *Le Droit des Gens ou Principes de la loi naturelle*, Amsterdam, 1775, vol. I, p. 142.

[5] *Encyclopaedia Britannica*, Cambridge, England, eleventh edition, 1910, vol. XIII, page 851.

sequently recognized in many treaties between various nations until it became very generally adopted. It is not, however, universally recognized. For instance, Norway claims that her jurisdiction extends four miles seaward from her furthest seaward islands, and Spain asserts that her sovereignty extends six miles from her coast.[6] In 1894 the British government protested against this claim of Spain.[7]

Applying this three-mile limit as the extent of the zone of territorial waters to bays and gulfs and other sinuosities, there gradually arose as a corollary, the rule of international law that, where the three-mile zones advancing from each shore at the entrance of the bay or other kind of sinuosity meet and form a line six miles across from land to land, that line of six miles should be taken as the base from which to measure the three-mile zone seaward, and that the sovereignty of the state, master of the surrounding land, did not extend further outward towards the sea, but that all the expanse of the bay inside of that six-mile line, no matter how wide and large the bay further within might become, should belong to the encircling nation, because the entrance was effectually occupied where the shores were not more than six miles apart. But the center of bays and other sinuosities whose entrance from the high seas was wider than six miles, form, with some historic exceptions, part of the open sea. Many publicists, such as Ortolan[8] and Hautefeuille,[9] for example, can be cited in support of the above rule.

This six-mile rule, however, has been modified in the case of many bays by treaty agreements between individual states. Thus by formal treaty between Great Britain and France in 1839, those two nations agreed as between themselves, that all bays along certain parts of their respective coasts which were ten miles or less wide at their entrance, should be territorial in their entirety. That ten-mile line has been adopted in many subsequent treaties and it would seem that the ten-mile rule is in process of displacing and superseding the six-mile rule.

Whether tested by the six-mile or the ten-mile rule, however,

[6] Sir Thomas Barclay, *Annuaire de l'Institut de Droit International*, vol. XII (1892–94), p. 125; Richard Kleen, *ibid.*, p. 140.

[7] Lord Derby to Mr. R. G. Watson, September 25, 1894. *Ex. Doc.*, 1875–76, Washington, Government Printing Office (1876), p. 641.

[8] Theodore Ortolan: *Diplomatie de la Mer*, Paris, 1856, vol. I, p. 157.

[9] L. B. Hautefeuille: *Des droits et des devoirs des nations neutres en temps de guerre maritime*, Paris, 1868, third edition. vol. I, p. 60.

the great sea named in honor of Henry Hudson clearly forms a part of the open sea and does not fall within the category of the territorial waters of Canada, excepting of course the band of three miles that follows the contour of its shores. For the entrance to Hudson's Bay and its connection with the ocean ranges in width from forty-five miles up to more than double that distance across from land to land.[10]

In considering the legal status of Hudson's Bay, the fact that it is called a bay should not be allowed to cloud the question in issue. For though it is called a *bay*, it is in reality a large *sea*. Not only is Hudson's Bay several times as large as the area of Great Britain, but in addition it is much larger than such seas as the Baltic and the Adriatic, both of which were in former centuries closed but are now open seas. In fact, it is larger than the North Sea and the Sea of Japan, and compares favorably in its area with Bering Sea, all of which form part of the high seas.

Especially, however, a comparison of the size and legal status of Hudson's Bay and the Gulf of St. Lawrence are instructive and illuminating as to any exclusive claims of Canada over the former body of water. The area of Hudson's Bay amounts to 1,222,610 square kilometers, while that of the Gulf of St. Lawrence amounts only to 219,300 square kilometers. Both these seas are encircled by lands of the British Empire, the former by the Dominion alone, the latter by Newfoundland as well as Canada. The connection of Hudson's Bay with the ocean is not less than forty-five miles in width, and in general it is more than twice that distance. The Laurentian Sea, besides its connection with the ocean through the Strait of Belleisle which is ten miles wide between Newfoundland Island and the mainland of Labrador, is joined to the Atlantic Ocean by Cabot Strait, sixty miles in width. This is not only ten times as much as the usual six-mile test—in the absence of a treaty providing another measure as to whether bays are territorial or not in their entirety—but also besides, the center of Cabot Strait is far beyond the reach of shore batteries. By all the usual tests of the law of nations the Laurentian Sea is a part of the high seas. The distinguished British jurist, Dr. Westlake holds that the Gulf of St. Lawrence is an open sea.[11] And in the North Atlantic Coast Fisheries Arbitration case, which was argued before and decided by The Hague

[10] The *Encyclopaedia Britannica*, Cambridge, England, eleventh edition, 1910, vol. XIII, p. 851.
[11] John Westlake: *International Law:* second edition, 1910, vol. I, p. 197.

Judicial International Court in 1910, the Gulf of St. Lawrence was recognized by implication as an open sea by all parties concerned. It has been so regarded from time immemorial by the nations of the world.

Why then should Hudson's Bay, which is five and a half times as large as the Laurentian Sea, at this late day in the development of the doctrine of the freedom of the sea, be classed suddenly as a *mare clausum?* If that great northern sea named after Henry Hudson is to be ranked as a closed sea, it must be so classified on some other grounds than its geographical limits unless at the same time many other seas of lesser extent are withdrawn from the category of open seas.

As has been said above, Vattel, the leading authority upon the law of nations for all the world in the second half of the eighteenth century, whose treatise still carries weight to-day and is cited with respect, held that Hudson's Bay formed a part of the open sea. But also in more recent times other distinguished publicists and jurisconsults have recognized Hudson's Bay specifically as an open sea. Thus for instance the Briton, Phillimore,[12] the German, Bluntschli,[13] the Russian, Fedor de Martens,[14] the Swiss-Belgian, Rivier,[15] have declared that Hudson's Bay forms a part of the high seas. And in the well-known "Encyclopaedia Britannica," eleventh edition, published in 1910, though it is said in the article on Hudson's Bay that Canada desires to make of Hudson's Bay a *mare clausum*, yet that large sea is acknowledged in that article to be a *mare liberum*. The writer says:[16] "The bay abounds with fish, of which the chief are cod, salmon, porpoise and whales. The last have long been pursued by American whalers, whose destructive methods have so greatly depleted the supply that the government of Canada is anxious to declare the bay a *mare clausum*."

There is a notable instance in the struggle for the maintenance of the freedom of the seas that supports that freedom for the waters of Hudson's Bay. In the early part of the last century, by an ukase issued in 1821 by the Emperor Alexander I, the Russian Government laid claim to an absolute dominion over Bering Sea, and also

[12] Sir Robert Phillimore: *International Law*, London, 1879, second edition, vol. I, p. 284.
[13] J. C. Bluntschli: *Le Droit International Codifie*, traduction de C. Lardy, Paris, 1886, sec. 309.
[14] F. de Martens: *Traite de Droit International*, Paris, 1883, vol. I, p. 504.
[15] Alphonse Rivier: *Principes de Droit des Gens*, Paris, 1896, vol. I, p. 155.
[16] *The Encyclopaedia Britannica*, Cambridge, England, eleventh edition, 1910, vol. XIII, p. 851.

a large portion of the northern part of the Pacific Ocean. Against this claim of exclusive jurisdiction beyond the usual narrow band of territorial waters following the contour of the coast line, the Government of Great Britain as well as that of the United States protested emphatically. The difference between America and Russia was arranged by the treaty of 5/17 of April, 1824, which recognized among other things the freedom of the North Pacific Ocean. The negotiations between Great Britain and Russia were more protracted, but were finally arranged by treaty in 1825.

George Canning, Foreign Secretary of Great Britain, wrote on September 27, 1822, to the British premier, the Duke of Wellington, with respect to the claims advanced by the Moscovite Government over the waters of Bering Sea and the extreme northern part of the Pacific Ocean. Concerning the pretensions advanced by Russia in the ukase of 1821, Canning maintained that such claims were, according to the best legal authorities, "positive innovations on the rights of navigation." By common usage, "an accessorial boundary," he said, had been added for a limited distance to the shores of a state in order to secure to that nation sufficient protection, without interfering with the rights of the subjects of other states to navigate and trade freely. As stated in the ukase, the Russian claims, he maintained, disregarded this important qualification, and consequently were "an encroachment on the freedom of navigation, and the inalienable rights of nations." Continuing, Canning referred to an exchange of views that he had had with the Russian Ambassador and said that he thought that Russia would rescind that portion of her public notification whereby she had announced that she would "consider the portions of the ocean included between the adjoining coasts of America and the Russian Empire as a *mare clausum*, and to extend the exclusive territorial jurisdiction of Russia to 100 Italian miles." Thus Canning in a communication to his chief, the Duke of Wellington, the executive head at that time of the British Empire, maintained that the claim of Russia to exercise, to the exclusion of others, her sovereignty over a large portion of the Pacific Ocean and also over Bering Sea, which was bounded exclusively by her coasts, though with many passages more than six miles wide connecting the main ocean with Bering Sea, was not justified by the law of nations, either as taught by the jurists learned in that science or by the actual practice of nations.

The principal object of the British Government during the negotiations with Russia from 1821 to 1825, that resulted in the Treaty of 1825, was to maintain the freedom of the waters of the Pacific Ocean and Bering Sea. This we know from the instructions that George Canning, British Foreign Secretary, gave to his cousin, Sir Stratford Canning, as the latter was about starting to resume negotiations with the Russian Government, at the point where they had been suspended at an earlier date. In the latter part of the instructions to Sir Stratford, the British Foreign Secretary said:[17]

> It remains only, in recapitulation, to remind you of the origin and principles of this whole negotiation.
>
> It is *not* on our part essentially a negotiation about limits.
>
> It is the demand of the repeal of an offensive and unjustifiable arrogation of exclusive jurisdiction over an ocean of unmeasured extent; but a demand qualified and mitigated in its manner, in order that its justice may be acknowledged and satisfied without soreness or humiliation on the part of Russia.
>
> We negotiate about territory to cover up the remonstrance upon principle.
>
> But any attempt to take undue advantage of this voluntary facility, we must oppose.

Thus, the British Empire sought for her chief object, during the negotiations over her conflicting interests with those of the Russian Empire concerning land and sea in Northwestern America and Bering Sea, to obtain from the Moscovite Government a public disclaimer of the claim advanced by Russia in 1821 that Bering Sea and large parts of the northern Pacific Ocean were Russian territorial waters.

In the Anglo-Russian treaty of February 16/28, 1825, concluded by Sir Stratford Canning for Great Britain and Count Nesselrode and M. de Poletica for Russia, the latter nation gave up her pretensions to absolute jurisdiction over the waters of the North Pacific Ocean or Bering Sea beyond the usual limit along the coasts.[18] At the same time the two nations agreed upon a land frontier that was to separate their North American land possessions.[19]

Hudson's Bay and Bering Sea much resemble one another. Those two large seas are in great measure surrounded by land. Before and at the time of the signing of the Anglo-Russian treaty of 1825, and afterwards until Russia sold Alaska to the United States in 1867,

[17] *Fur Seal Arbitration, British Case*, Washington, vol. IV, p. 448.

[18] *Fur Seal Arbitration*: Washington, vol. IV, p. 42.

[19] Thomas Willing Balch: *The Alaska Frontier*, Philadelphia, 1903, pp. 5–6.

the land encasing those two seas was possessed by a single nation. If the entrance from the main ocean to those two seas, one called a sea and the other a bay, were six miles or less in width, both of them, at the time the Anglo-Russian Treaty of February, 1825, was signed, would have been classified according to the doctrine of *mare clausum* as closed seas. Russia had proclaimed openly to all the world her right of exclusive jurisdiction over the waters of Bering Sea, as well as part of the Pacific Ocean further toward the south. Russia wished very much to include Bering Sea within her own domain as a *mare clausum*. Like the United States, however, Great Britain contested this proposed extension of Russian jurisdiction over all of Bering Sea on the plea that, according to the accepted rules of international law, Bering Sea formed a part of the high seas and consequently was an open sea. And as the Russian Government gave up in 1824 to the United States, it likewise yielded in 1825 before the protest of Great Britain the Moscovite claim that Bering Sea was a *mare clausum*. But if Bering Sea was a *mare liberum* as the government of Great Britain asserted with so great success in 1825 against the contrary claim of the Russian Government, why then, according to the same line of argument, is not Hudson's Bay also a *mare liberum*? Surely the strong presentation of facts and the able arguments made with such success by the official representatives of Great Britain in the first quarter of the last century against the attempt of Russia to withdraw Bering Sea from the area of the high seas, by declaring it a closed sea, are applicable to the analogous status of the waters of Hudson's Bay. Surely if Bering Sea was an open sea in 1825, so also was Hudson's Bay. When, since that time, have either or both of them become closed seas?

From the foregoing brief survey of some of the historic facts and rules affecting the international status of the waters of the Hudsonian Sea, it is evident that that great body of salt water forms, like Bering Sea, the Baltic Sea, the Adriatic Sea and many other similar large sinuosities, part of the high seas. And that consequently Hudson's Bay is still what it was when Vattel wrote in the middle of the eighteenth century, an open sea.